U.S. Department of Labor Board of Alien Labor Certification Appeals
800 K Street, N.W.
Washington, D.C. 20001-8002

Date: December 16, 1998
Case No.: 1996-INA-00262

In the Matter of:

COASTAL POWER PRODUCTION COMPANY,
Employer

On Behalf Of:

YI-CHOU LIN,
Alien

Certifying Officer Charlene G. Giles, RegionVI
Appearance: Jose R. Perez, Jr., Esq.
For the Employer/Alien
Before: Huddleston, Lawson and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File, and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On October 28, 1994, Coastal Power Production Company ("Employer") filed an application for labor certification to enable Yi-Chou Lin ("Alien") to fill the position of Associate Project Manager (China) (AF 137-138). The job duties for the position are:

> Responsible to locate power needs, bids and secure contracts with electric utilities. Evaluate and analyze the cost of constructing and operating power plants. Analyze market demand for commodities and negotiate with local government officials power sales contracts. Identify and negotiate debt and equity financing. Estimate capital costs and proforma cash flow projections. Supervise the design and engineering components of power generation projects.

The requirements for the position are a Bachelor's Degree in Engineering and one year of experience in the job offered or one year of experience as a Financial Analyst. In addition, the Employer listed the following as Other Special Requirements, "40% of international travel required. Must speak, read and write Mandarin Chinese."

The CO issued a Notice of Findings on November 29, 1995 (AF 104-106), proposing to deny certification on the grounds that the Employer failed to establish that a *bona fide* job opportunity is open to qualified U.S. workers and is located in the United States. In addition, the CO found that the Employer failed to establish that all U.S. applicants were rejected solely for lawful, job-related reasons.

Accordingly, the Employer was notified that it had until January 3, 1996, to rebut the findings or to cure the defects noted.

In its rebuttal, dated January 3, 1996 (AF 24-102), the Employer contended that 60% of the Associate Project Manager's time will be spent in the United States performing the job duties listed on the ETA 750A. The Employer submitted several documents as evidence of the job duties performed by the Associate Project Manager.

The CO issued the Final Determination on January 31, 1996 (AF 21-23), denying certification because the Employer failed to establish that a *bona fide* job opportunity exists within the United States.

Discussion

Section 656.3 defines "Employer" as a person, association, firm, or corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United

States. Furthermore, § 656.20(c)(8) requires an employer to attest that the job opportunity has been, and is clearly open to any qualified U.S. workers.

In the instant case, the CO questioned whether the Employer's job opportunity is one located in the United States to which qualified U.S. workers may be referred (AF 105-106). As such, the CO instructed the Employer to submit documentation showing that the job is clearly open to U.S. workers and that there is work to be performed in the United States. Specifically, the CO requested that the Employer submit contracts which are currently pending in the United States which the Associate Project Manager will be required to oversee. In addition, the CO noted that evidence of work to be performed in China would not be acceptable documentation.

In rebuttal, the Employer stated that the individual filling the Associate Project Manager position would spend 60% of his time in the United States (AF 25). In addition, the Employer submitted several documents, including a memorandum to the Board of Directors of Coastal Corporation requesting approval to form a Sino-foreign joint venture (AF 26-36); an internal memorandum regarding the Suzhou project (AF 37-41); a cooperative joint venture contract for a cogeneration power plant in China (AF 42-58); and, a construction contract for an electric power plant in China (AF 59-102).

We emphasize that it is the employer's burden to establish that a *bona fide* job opportunity exists at a location within the United States. See *Amger Corp.*, 87-INA-545 (Oct. 15, 1987) (*en banc)*; *State of California Dept. of Consumer Affairs,* 94-INA-396 (July 18, 1995). However, the Employer in this case failed to produce any documentation showing that the individual filling this position would be required to work in the United States. In fact, all of the Employer's documentation refers to projects outside of the United States. As such, the Employer has offered only his undocumented assertions that 60% of the Alien's time would be spent in the United States. Although a written assertion constitutes documentation that must be considered under *Gencorp,* 87-INA-659 (Jan. 13, 1988) (*en banc)*, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof.

Therefore, we find that the Employer has failed to establish that a *bona fide* job opportunity exists at a location within the United States. Accordingly, the CO's denial of labor certification must be AFFIRMED.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

Dissent of Judge Lawson:

I dissent. Initially, the CO requested employer to demonstrate the business-related need for the special requirements of the job, namely: (AF 131)

> 40% of international travel required.
> Must speak, read and write Mandarin Chinese. (AF 137)

Employer responded: (AF130)

> The main reason for these requirements is that the Associate Project Manager has to travel to China in order to locate power needs, bids and secure contracts with electric utilities there. In addition, the Associate Project Manager (China) is required to negotiate the local government officials power sales contracts; identify and negotiate debt and equity financing; and supervise the design and engineering components of power generation projects in China.
>
> The activities described above must be conducted in person as it requires ongoing negotiations with Chinese officials and substantial review of Chinese documents prepared in the official language of China, Mandarin Chinese. It is therefore imperative that the Associate Project Manager (China) be able to speak, read and write Mandarin Chinese in order to effectively fulfill the duties required of this position.

The employer's response on the issue of business necessity somehow, incredibly, led the CO to conclude in the NOF that: (AF 105-106)

> It appears the employer actually has a job offer in China, not the United States.[1]
> ****
> The employer's rebuttal evidence to the Notice of Findings must consist of documentation that the work to be performed is actually in the United States. This documentation should consist of, but is not limited to, contracts which are currently pending which establish the Associate Project Manager will oversee projects in the United States. Work to be performed in China will not be acceptable documentation.

In rebuttal, employer's December 17, 1995 letter enclosed 4 contracts for power plant development in China and stated: (AF 25)

> In the instant case, the Associate Project Manager (China) will be working and based at our corporate headquarters in Houston, Texas. This job offer is for a full-time, regular position in the United States. Here, the following special requirements are necessary as a business necessity: 40% international travel required; must speak, read, and write Mandarin Chinese. Although 40% international travel is required for this position, clearly the Associate Project Manager will spend 60% of his/her time in the United States performing the job duties detailed on the ETA-750A item #13 including: locating power needs, bids and secure contracts with electric utilities; evaluate utilities; evaluate and analyze the cost of constructing and operating power plants; analyze market demand for

[1] All underlining herein added for emphasis

commodities; identify and negotiate debt and equity financing; estimate capital costs and pro forma cash flow projections; supervise the design and engineering components of power generation projects. As evidence of these job duties, please find listing of current project activities.

As a leading power and energy developer worldwide, Coastal's primary objective is to conceive and develop energy infrastructure projects such as power plants and gas pipelines. Our responsibilities in order to make projects functional include Engineering, Operations, Procurement, Construction and Maintenance. As such, Coastal executives and high level professionals such as an Associate Project Manager, are required to travel extensively in order to perform their respective jobs. (AF 25)

Employer further stated: (26)

Coastal Power Company ("Coastal Power"), a wholly-owned subsidiary of The Coastal Corporation, was established in 1988 to participate in the emerging cogeneration and independent wholesale electric generation business. As an international independent power company, it is actively pursuing private-sector projects worldwide.

Since the beginning of 1994, Coastal Power has placed primary importance on its overseas business, particularly the emerging markets in Asia and Latin America. Coastal Power currently has power projects around the world, the following is a sample listing of them: (AF 26)

and then listed 5 power projects in the Americas, 7 in the Far East, 2 in Europe and 7 in the Indian continent.

The FD stated:

A Notice of Findings issued November 29, 1995 explained that <u>it appears the employer actually has a job offer in China, not the United States</u>. The Notice of Findings also informed the employer that a job opportunity may only be certified when the work to be performed takes place in the United States. <u>Work to be performed in another country makes the job inappropriate for certification.</u>

The employer was required to present rebuttal evidence to document that this is, in fact, an opportunity which is clearly open to U.S. workers, and that the work to be performed is actually in the United States. The Notice of Findings requested contracts that were currently pending which established the Associate Project Manager will oversee projects in the United States; that work performed in China would not be acceptable documentation. (AF 22)

and, after summarizing the 4 contracts submitted by employer in rebuttal, concluded: (AF 23)

The employer has failed to document that a bona fide job offer which is in the United States actually exists. The employer has failed to document that <u>full-time employment</u>

within the United States is clearly open to any qualified U.S. worker. Consequently, it is not possible for this office to determine the employer has met the criteria established at § 656.3 and § 656.20(c)(8). (AF 23)

The cited sections provide, as material:

s.656.3 Definitions...

Employer means a...corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States...

§ 656.20(c)(8)

The job opportunity has been and is clearly open to any qualified U.S. worker.

The CO has transformed the requirement "to employ a full-time worker at a place within the United States" to mean that such worker could not perform any of his duties outside of the United States. The CO's conclusion that "it appears the employer actually has a job offer in China, not the United States" is not mere speculation - it is a piece of nonsense. The CO seemingly labors under the impression that workers are unable to do work in the U.S. on foreign projects. The CO's limitation that they "will oversee projects in the United States", as stated in the NOF and repeated in the FD, apparently means that the CO would limit workers to domestic projects in which all of the work will be performed in the U.S., a sophistic and tortured interpretation of the regulations and an unfortunate precedent. The CO has turned on its head the employer's showing of business necessity for performance of 40% of the work overseas, in response to the requirement to show business necessity for such travel, to a conclusion that there would be no work in the U.S., a *non-sequitur*. Employer, an international independent power company and wholly owned subsidiary of The Coastal Corporation,[2] states that the alien "will be working and based at our corporate headquarters in Houston, Texas." There is no suggestion or indication that the employer has fabricated a job to secure admission of the alien.[3] On the contrary, employer has offered an attractive salary of $50,000 (AF 137) compared to the local prevailing wage of $36,700. (AF107). The job involves management and not production line activities which can be quantified. It is management's prerogative to determine where the alien's managerial duties and office work will be performed and to manage its projects from the location it deems appropriate. Here the employer has determined that management will be conducted 60% from corporate headquarters with travel to the field (China) 40% of the time. A detailed classification of the domestic versus foreign duties under the 4 voluminous contracts is a pedantic exercise that is not warranted under the circumstances. It is noted that 3 U.S. workers by their

[2] The holding company for a major global energy conglomerate domiciled in Houston, Texas which has revenues of $12 billion and 14,000 employees per its SEC 10-K.

[3] If the CO believed there was fraud or willful misrepresentation, the matter could have been referred to the INS for investigation. 20 CFR s.656.31(a)

applications apparently had no problem in envisaging employment of a U.S. worker in a position requiring 40% foreign travel with the principal work to be performed in the U.S.

The purpose of the Act is to permit employers to obtain from aliens needed skills which are unavailable from domestic workers.[4] The listed duties are such that a substantial portion of them would necessarily be undertaken with support at corporate headquarters. The FD would apparently have employer export the entire job to foreign soil which is not only contrary to national interests but is an invasion of management's right to conduct its business in the most efficient and effective manner it sees fit - here, out of its corporate headquarters, rather then attempting to set up offices on the Chinese mainland for employment of the Taiwan national alien, a problematic feat. Denial of necessary alien skills to domestic corporations, through the narrow concept that aliens may work only on U.S. domestic projects, will frustrate the ability of U.S. corporations to compete for emerging nation business in the growing global economy.

Reviewing the qualifications of the 3 U.S. applicants (AF 120-122), it is clear that employer was correct in concluding, for the reasons stated in employer's June 29, 1995 letter, that these applicants were not qualified. (AF 112-113)

The FD should be reversed and the case remanded to the CO for certification of the alien.

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

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[4] The House Committee Report, explaining the bill that was enacted into law as the Immigration Act amendments of 1990 (8 U.S.C. and A. News, 6711, et seq.), stated:

> The U.S. labor market is now faced with two problems that immigration policy can help to correct. The first is the need of American Business for highly skilled, specially trained personnel to fill increasingly sophisticated jobs for which domestic personnel cannot be found...The Committee is convinced that immigration can and should be incorporated into an overall strategy that promotes the creation of the type of workplace needed in the increasingly competitive global economy without adversely impacting on the wages and working conditions of American workers. (Pp.6721)

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.